No. 92-515

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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STATE OF WISCONSIN,
*Petitioner,*

v.

TODD MITCHELL,
*Respondent.*

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**On Writ of Certiorari to the Supreme Court of Wisconsin**

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## BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether the First Amendment prohibits States from providing greater maximum penalties for crimes if a fact-finder determines that a criminal offender intentionally selected his or her crime victim because of the victim's race, color, religion or other specified status.

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### INTEREST OF THE *AMICI CURIAE*

*Amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* have a compel-

ling interest in legal issues that affect the power of state and local governments to carry out their responsibilities to their citizens, including the responsibility to protect and preserve public safety and order.

"Hate crimes" are an escalating phenomenon throughout the nation and are dangerously corrosive of the social fabric. Indeed, they present one of the most serious threats to a civilized society of our time. *See* U.S. Conference of Mayors, *Addressing Racial and Ethnic Tensions: Combatting Hate Crimes in America's Cities* (June 1992). Because of their gravity, bias-related crimes have elicited strong responses from the majority of States and many local governments, *see id.*, including penalty enhancement statutes of the type at issue here. The Wisconsin statute is a valid and reasonable legislative response to this serious threat to public safety and order, and falls within an area that the Court has long regarded as the province of state legislatures. *See, e.g., Harmelin v. Michigan*, 111 S. Ct. 2680, 2703-04 (1991) (Kennedy, J., concurring).

Because of the importance of the issue presented to *amici* and their members as well as its implication for other anti-discrimination legislation, *amici* submit this brief to assist the Court in its resolution of the case.[1]

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.



## SUMMARY OF ARGUMENT

Nothing in the First Amendment prohibits a State from punishing a person convicted of a crime more severely when that person intentionally selects the victim of the crime because of race or other specified status. To the contrary, there is a compelling state interest in the prevention of such crimes. Under our federal scheme of government, States are charged with protecting and preserving the public safety through their police power. The sad truth is that States and local governments increasingly find their citizens the targets of crime simply because of their race, religion, sexual orientation or other group status. Such crimes are more serious in their repercussions than similar crimes committed without such victim selection; they adversely affect not only the victim, but also the members of the group to which the victim belongs and indeed tend to polarize the entire community. *See Bias Crime: The Law Enforcement Response* (Nancy Taylor ed., 1991). These crimes need to be dealt with more severely to preserve the public safety of our society and the civil rights of all citizens.

The Wisconsin statute at issue here avoids the constitutional problems raised by the St. Paul ordinance in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), because it is directed at criminal conduct and not at thought or expression. It is triggered only when an individual has selected a victim based upon that victim's race, religion or other protected characteristic *and* has then proceeded to commit a crime against that victim. In this case, respondent received an enhanced sentence not for his thoughts or words, but rather for acting upon those thoughts and words in a violent, unprovoked attack upon a victim selected because of his race.

Nor does the penalty enhancer statute indirectly chill thought or expression. The statute did not preclude Mr. Mitchell from feeling outraged at the historical mistreatment of blacks. Nor did it preclude him from communicating his feelings. Indeed, if Mr. Mitchell had merely communicated racial animosity rather than act on his prejudices, the penalty enhancement statute would never have come into play. What Wisconsin has sought to—and has every right to—deter is the next step: the act of hunting down and assaulting a 14 year old boy because of his race.

Such enhancement of criminal sentences does not offend the First Amendment's limitations on the regulation of thought or expression. Moreover, it is consistent with fundamental premises of both general sentencing law and mainstream civil rights legislation. Essentially, Wisconsin has made it a relevant sentencing consideration that, in violating the State's Criminal Code, the defendant has selected his victim based on a criterion such as race. Considering such a factor at sentencing is hardly novel; a defendant's motive for engaging in criminal conduct, whether pecuniary gain, personal animosity or racial hatred, has always been a legitimate factor to be considered by the sentencing judge. *See Williams v. New York*, 337 U.S. 241, 245 (1949).

Moreover, contrary to the conclusion of the court below, there is no principled distinction between the penalty enhances and other anti-discrimination legislation. Both are directed against unlawful conduct that is based on the victim's protected characteristics. Both require a discriminatory "thought" that is accompanied by an act of some kind. By attaching legal consequences to the singling out of crime victims on the basis of race, religion, or other such



characteristics, the Wisconsin penalty enhancer operates like other anti-discrimination laws. If respondent's enhanced sentence violates the First Amendment, it is questionable whether employers or landlords can be held liable when they engage in invidious discrimination.

## ARGUMENT

### I. IT IS THE CONSTITUTIONAL ROLE OF THE STATES TO PRESERVE THE PUBLIC SAFETY AND ORDER.

Under the scheme of federalism embodied in our Constitution, it is States and local governments that in the first instance are charged with protecting and preserving the public safety and order. They do so not only to ensure safety, but to foster a civilized society in which individual rights may be freely exercised by all. Through the use of their "police power," States and local governments carry out their function of preserving public order by proscribing conduct that is destructive of our system of ordered liberty. Indeed, it is a fundamental role of the States to do so. *See, e.g., Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs."); *Breard v. City of Alexandria*, 341 U.S. 622, 640 (1951).

In seeking to provide public safety and order, States are increasingly confronted with the problem of violent attacks committed against their citizens for no reason other than that citizen's skin color, perceived national origin, religious affiliation, or other characteristics. As state and local governments throughout the nation have realized, these attacks pose serious and unique problems.

These so-called "hate crimes" are more likely to be violent [2] and to be perpetrated against complete strangers than are other crimes.[3] Victims of these crimes are subject to a more profound and pervasive sense of vulnerability [4] which may lead to their withdrawal from community life.[5] Moreover, such crimes harm not only their direct victim, but also those in the group to which the victim belongs.[6] In this manner, hate crimes fragment and polarize communities, creating tension and triggering unrest and retaliation.[7] The destructive potential of hate crimes has been illustrated by the racially-motivated Howard Beach and Bensonhurst crimes in New York City, each of which triggered "waves of less serious incidents, such as minor assaults, harassments, and vandalisms, in which offenders invoked those crimes as rationales for their behaviors." James Garofalo & Susan E. Martin, *The Law Enforcement Response to Bias-Motivated Crimes, in Bias Crime* 17, 18.

[2] Brian Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 Stan. Law & Pol'y Rev. 165, 166-67 (Winter 1992-93).

[3] *See, e.g.*, William A. Marovitz, *Hate or Bias Crime Legislation, in Bias Crime: The Law Enforcement Response* 1, 2 (Nancy Taylor ed., 1991). This compilation by Nancy Taylor is hereafter cited as "*Bias Crime.*"

[4] *See* James Garofalo & Susan E. Martin, *The Law Enforcement Response to Bias-Motivated Crimes, in Bias Crime* 17, 17-18; Joan C. Weiss, *Ethnoviolence: Impact and Response in Victims and the Community, in Bias Crime* 93, 100.

[5] *See, e.g.*, Weiss, *Ethnoviolence, supra*, at 100.

[6] *See, e.g.*, Robert J. Kelly, *Bias-Motivated Crime, in Bias Crime* 135, 135; Werner Petterson, *Awareness Training for Police: Bias-Motivated Crimes, in Bias Crime* 35, 37; Marovitz, *Hate or Bias Crime Legislation, supra*, at 2-3.

[7] *See, e.g.*, Marovitz, *Hate or Bias Crime Legislation, supra*, at 2; J. David Coldren, *Bias Crimes: State Policy Considerations, in Bias Crimes* 127, 127.



Because hate crimes are more damaging than other crimes, both to the individual victim and to the greater community, it is entirely appropriate that the more harmful nature of the crime be reflected in an enhanced penalty. Inherent in our system of criminal justice is the idea that more serious crimes—that is, crimes causing a greater amount of harm—can be punished more severely than lesser crimes. As the Court noted in *Payne v. Tennessee*, 111 S. Ct. 2597, 2605 (1991),

> the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment. Thus, two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm.

Not only is the imposition of a harsher penalty for a more harmful crime fair, it also leads to an appropriately elevated level of deterrence for the more severe crime. The destructive nature of bias-based crimes was justifiably condemned—and the compelling interest in preventing them recognized—by this Court itself in *R.A.V.* *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2549 (1992); *id.* at 2556 (White, J., concurring).

In order to maintain public peace and order, the State of Wisconsin adopted a reasonable statutory solution designed to break this cycle of violence. Section 939.645 enhances the penalty to which a convicted criminal can be sentenced upon a finding by

the trier of fact that the criminal "[i]ntentionally select[ed] the person against whom the crime . . . [was] committed . . . because of" the victim's race, religion, color, disability, sexual orientation, national origin or ancestry.[8] The enhanced penalty is meant both to deter criminal acts against such victims, and, if that fails, to enable the sentencing judge, when appropriate, to punish the criminal more severely because of the increased severity of the crime. The Wisconsin statute also lessens the possibility of retaliation by reassuring the community at large that the State has recognized the problem and is addressing it.

Under the Constitution, state legislatures are given wide latitude to find solutions to the problems facing their communities, as long as those solutions do not offend constitutionally protected rights. *See Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991). The Court has expressly recognized the need for deference to legislative judgments concerning the length of sentences. *See Rummell v. Estelle*, 445 U.S. 263, 274 (1980) ("the length of the sentence actually imposed is purely a matter of legislative prerogative"); *Gore v. United States*, 357 U.S. 386, 393 (1958); *see also Harmelin*, 111 S. Ct. at 2703-04 (Kennedy, J., concurring). *Cf. Cicenia v. La Gay*, 357 U.S. 504, 510 (1958) ("This Court has often recognized that it is of the 'very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice.'") (citation omitted). In this case, the Court need only address the constitutional issue raised by the Wisconsin Supreme Court's invalidation of section 939.645, namely, whether it is precluded by the strictures of

[8] The full text of the statute is set forth at Pet. App. 72-73.



the First Amendment. As the remainder of this brief will show, the statute does not violate the First Amendment.

## II. THE FIRST AMENDMENT DOES NOT PROHIBIT AN ENHANCED SENTENCING OPTION FOR A CRIME INTENTIONALLY PERPETRATED BECAUSE OF THE VICTIM'S RACE OR OTHER GROUP STATUS.

### A. The Penalty Enhancer Statute Addresses Conduct, Not Speech.

The Wisconsin statute allows for an enhanced sentence for those whose criminal acts are intentionally directed at a person because of the race, religion, disability, sexual orientation, national origin or ancestry of the victim. Such conduct is not afforded First Amendment protection.

Although the First Amendment admittedly protects certain types of conduct in addition to spoken or written words, *see Texas v. Johnson*, 491 U.S. 397, 404 (1989), its protection of conduct is narrowly circumscribed. The First Amendment's protections extend only to conduct that has such communicative content as to be the virtual equivalent of printed or spoken words. *Spence v. Washington*, 418 U.S. 405, 409-10 (1974); *Johnson*, 491 U.S. at 403. Conduct that is not "sufficiently imbued with elements of communication" is not afforded any special protection. *Spence*, 418 U.S. at 409. The mere fact that a person claims to be expressing himself or herself through conduct does not itself vest that conduct with First Amendment protection; the conduct must have such recognizable "communicative connotations" that "the likelihood [is] great that the message would be understood by those who viewed it." *Id.* at 410-11. Thus, the Court has expressiy rejected "the view that an

apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). In addition, as the Court noted last term in *R.A.V.*, "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." 112 S. Ct. at 2546-47.

The penalty enhancer regulates only conduct that constitutes a crime under the Wisconsin Criminal Code. The commission of such crimes is not "expressive conduct" protected by the First Amendment; aggravated battery is not protected speech. The Wisconsin statute merely enhances the punishment for criminal conduct that has particularly egregious societal consequences. Victimizing a person because of his race or religion does not bring criminal conduct within the protection of the First Amendment.

That the Wisconsin statute is directed at conduct rather than expression distinguishes it from the "fighting words" ordinance struck down in *R.A.V.* The ordinance invalidated in *R.A.V.* criminalized placing "on public or private property a symbol, object, appellation, characterization or graffiti . . .which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *R.A.V.*, 112 S. Ct. at 2541. By its terms, the St. Paul ordinance was directed at expression; it applied exclusively to symbols of bigotry with "communicative connotations" that would readily "be understood by those who viewed [them]." *Spence*, 418 U.S. at 410-11. The Court thus held that such a prohibition of "messages of 'bias-motivated' hatred," *R.A.V.*, 112 S. Ct. at



2548, was impermissible because it "prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." *Id.* at 2542.

By contrast, the criminal acts covered by the Wisconsin statute are not "otherwise permitted speech." Assault, arson, robbery, and the like have never been considered to be protected speech. Such conduct has never been held to be "sufficiently imbued with elements of communication," *Spence*, 408 U.S. at 407, to be protected speech under the First Amendment. Enhancing possible penalties for such conduct when it is directed at victims selected because of their "race, religion, color, disability, sexual orientation, national origin or ancestry," Wis. Stat. § 939.645, does not convert crime into protected speech.

The Wisconsin Supreme Court nonetheless concluded that the penalty enhancer violates the First Amendment because it "punishes bigoted thought." Pet. App. 8. The court reasoned that as the underlying criminal actions were already punishable under the Wisconsin Criminal Code, the statute necessarily punished pure thoughts and ideas. This syllogism, however, does not withstand analysis. The statute does not allow for enhanced penalties merely for an abstract thought, or even a communicated one. No enhancement is possible—indeed, no crime occurs—unless the actor *acts* on his or her victim selection and commits a crime based thereon, a crime more serious than a common battery because of the societal ramifications of a crime based on the victim's group status. A person remains free under the statute to harbor bigoted thoughts, no matter how repugnant to the remainder of society. Indeed, a person is free,

under the statute, to give voice to those thoughts.[9] The statute takes effect only when a person turns those thoughts into action. As the Court made clear in *R.A.V.*, a State may prohibit actions directed at particular groups or persons as long as the actions are not protected speech. *R.A.V.*, 112 S. Ct. at 2548 ("a prohibition of fighting words that are directed at certain persons or groups . . . would be facially valid" under the First Amendment). The enhancer, far from punishing bigoted thought as such, does no more than punish criminal actions taken against victims because of their immutable characteristics.

Because it criminalizes only action, the Wisconsin statute has no "chilling effect" on speech. It does, however, have a deterrent effect—a wholly permissible one. The Wisconsin statute aims to deter the commission of those crimes that take place because of the victim's race or other characteristics. It chills not thought, but the conversion of certain thoughts into criminal conduct.[10] If such action is indeed chilled, no "idea" is lost, but criminal conduct is prevented.

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[9] Although the Wisconsin statute does not come into play until victim selection is acted upon, speech urging the targeting of victims can, under certain circumstances, itself be regulated consistently with the First Amendment. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (A State may forbid "advocacy of the use of force or of law violation . . . where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

[10] *Cf. United States v. Grayson*, 438 U.S. 41, 54 (1978) ("Assuming, *arguendo*, that the sentencing judge's consideration of defendants' untruthfulness in testifying has any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible. There is no protected right to commit perjury.").



**B. Use Of Evidence Of Speech Does Not Offend First Amendment Values.**

The essence of the penalty enhancer statute—and the basis for the First Amendment challenge to it—is its differentiation of criminal conduct depending on whether the defendant intentionally selected his victim based on race, religion or certain other characteristics. If so, he may receive a more severe sentence for that crime.

Treating acts differently depending on the reasons behind them is a notion deeply imbedded in our law and does not violate the First Amendment. The examination of a defendant's motive, solely for purposes of determining an appropriate sanction for his *actions*, is integral to the areas of law implicated by the penalty enhancer: sentencing and anti-discrimination law. In each area, the law can validly determine the defendant's motive and evaluate his actions accordingly in determining the proper response thereto. Far from being a First Amendment violation, this process is a necessary step toward the laudable goals of rooting out invidious discrimination and dealing appropriately with criminal activity.

***1. "Motive" Is A Legitimate Sentencing Consideration.***

The penalty enhancer is in form a law of sentencing; it provides the judge with the option of imposing a heavier sentence than would otherwise be available because of the community's view of the severity of the criminal conduct at issue. In matters of sentencing, the law traditionally permits almost unlimited consideration of the defendant's background, behavior and relevant thoughts in determining a proper sentence.

As this Court has often recognized, the sentencing judge has broad discretion in imposing sentences and may properly consider a wide variety of factors, including the defendant's motive in committing the crime. In *Williams v. New York*, for example, this Court upheld a New York procedure that permitted the sentencing judge to consider "information about the convicted person's past life, health, habits, conduct and mental and moral propensities." 337 U.S. 241, 245 (1949). As the Court noted, "[h]ighly relevant, if not essential to [the trial judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Id.* at 247. *See also Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."); 18 U.S.C. § 3577 ("No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense" which the court can consider in determining "an appropriate sentence.").

In *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), this Court recently upheld, against a First Amendment challenge, consideration of a defendant's beliefs as a factor in imposing the ultimate sentence of death. The Court found that

> the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.



*Id.* at 1097. Although the Court rejected the specific evidence in that case—a stipulation concerning defendant's membership in a racist prison gang—it did so based on the lack of a sufficient showing of the relevance of that evidence. There was no racial element to the crime, and the narrow stipulation "proved nothing more than Dawson's abstract beliefs." *Id.* at 1098. The Court specifically suggested that a more relevant factual showing concerning the relationship between the defendant's gang membership and relevant sentencing criteria would have satisfied the First Amendment. *Id.* at 1097, 1098.

An example of the permissible use of evidence of racial hatred for sentencing purposes is found in *Barclay v. Florida*, 463 U.S. 939 (1983). In *Barclay*, the defendant was sentenced to death based, in part, on evidence that the murder in question was motivated by the desire to start a race war. The plurality noted that the Constitution "does not prohibit a trial judge from taking into account the elements of racial hatred in this murder." *Id.* at 949 (opinion of Rehnquist, J.).

All of these approaches to sentencing are—like the Wisconsin law—valid under the First Amendment because they do not attempt to regulate or suppress ideas or expression. They employ the universally recognized prerogative of the sentencing authority to consider a broad array of information about the convicted criminal, including ideas or thoughts which led to the commission of the offense, or which show the likelihood of recurrence, in determining the appropriate sentence.

### 2. *There Is No Principled Distinction Between The Penalty Enhancer And Other Anti-Discrimination Statutes.*

The Wisconsin Supreme Court invalidated the penalty enhancer statute on the grounds that it created a "thought crime," apparently because use of the statute required consideration of what it termed "motive," *i.e.*, the reason for committing a crime, rather than simply "intent," *i.e.*, the necessary state of mind for a criminal act. Pet. App. 20-21. Recognizing that the logical implication of its reasoning could lead to the wholesale invalidation of numerous other anti-discrimination statutes, the court attempted to distinguish those statutes as prohibiting "objective acts of discrimination" in contrast to the penalty enhancer, which it described as punishing not an "objective" act but "a subjective mental process." Pet. App. 20 (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2). The court's reasoning is erroneous.

As an initial matter, the Wisconsin court's distinction between "motive" and "intent" is irrelevant in First Amendment analysis. The First Amendment protects ideas and their expression. As the Court noted in *R.A.V.*, even content-based regulation may be valid under the First Amendment so long as "there is no realistic possibility that official suppression of ideas is afoot." 112 S. Ct. at 2547. The Wisconsin statute is not targeted at the suppression of ideas. It deals with criminal activity perpetrated against victims selected because of characteristics such as their race or religion.

The Wisconsin statute does not penalize abstract hatred of racial, religious or other groups, or communicative expressions of that abstract hatred.



Rather, it penalizes the conduct of a person who acts on his hatred in violation of the Criminal Code. Because such a crime has a greater cost to society, the Wisconsin statute appropriately provides for a greater punishment for this conduct.[11]

*Amici* respectfully submit that no principled distinction can be drawn between the penalty enhancer and other anti-discrimination statutes. The latter

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[11] The distinction between "motive" and "intent" embraced by the court below, in addition to being immaterial for First Amendment purposes, is questionable. The statute asks *whether* the defendant intentionally selected his victim because of that victim's group status; it does not inquire *why* a defendant selected a victim of a particular race or religion. In this respect the statute is akin to a specific intent crime, *i.e.*, a crime which requires that an act "be done with some specified further purpose in mind," or "a crime that requires subjective awareness of some specific circumstance." Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes* 230 (1989); *see also* M. Cherif Bassiouni, *Substantive Criminal Law* 177-78 (1978); William L. Burdick, *The Law of Crime* § 120 at 139-40 (1946). Because the statute allows for enhancement only if the State has proved the intentional selection on the basis of race beyond a reasonable doubt, *see* Wis. Stat. § 939.645, the statute, in effect, creates a scheme of greater and lesser included offenses. Most States have enacted statutory schemes under which proof of certain specific intent crimes (*e.g.*, burglary, assault with intent to kill) necessarily encompasses proof of lesser included offenses (*e.g.*, breaking and entering, assault). *See* Burdick at 140. Conviction of, and punishment for, the commission of these greater offenses necessarily requires an inquiry into the mental state of the defendant. But this process hardly renders these offenses "thought" crimes. Rather, these greater offenses are concerned solely with "objective acts" in a manner comparable to the Wisconsin statute here.

enhance the protection afforded individuals when they are victims of discrimination on the basis of protected characteristics such as race, religion and national origin. The Wisconsin statute, like these other anti-discrimination statutes, validly attempts to protect citizens from being victimized on the basis of such characteristics. *See R.A.V.*, 112 S. Ct. at 2546-47 (distinguishing the operation of Title VII from the St. Paul ordinance struck down in that case).

What all these laws have in common is that they are all "victim selection" laws. All of them prohibit, through civil or criminal sanctions, certain actions when those actions are undertaken because of the status of the person suffering adverse consequences. These statutes routinely require proof of discriminatory "animus" or purpose as an element of a claim. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) ("[W]e also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986 (1988) ("In such 'disparate treatment' cases . . . the plaintiff is required to prove that the defendant had a discriminatory intent or motive.").

The distinction relied upon by the court below—that the penalty enhancer punishes a "subjective mental process" but that anti-discrimination laws punish an "objective act", Pet. App. 20—does not withstand analysis. Both the Wisconsin statute and anti-discrimination laws require a discriminatory motive or "animus" and an act of some kind. Both seek to deter or punish unlawful conduct, but before doing so require proof of the "thought" that underlies the act.[12] By attaching legal consequences to the singling out of crime victims on the basis of race, religion, or other immutable characteristics, the Wisconsin penalty enhancer operates in the same manner as other anti-discrimination laws. If the First Amendment does not allow Wisconsin to punish respondent for the criminal conduct he engaged in because of his victim's race, then it is questionable whether employers or landlords can be held liable for their discriminatory conduct.



[12] The court below was also concerned about the fact that the penalty enhancer allowed the prosecution to introduce evidence of statements by Mr. Mitchell that advocated crime against white people, on the ground that this might chill the expression of such ideas. The admission of evidence of motive in a prosecution under the penalty statute no more chills expression than the admission of statements to establish motive in other criminal prosecutions. Evidence of motive is routinely admitted in criminal cases. *See* Fed. R. Evid. 404(b); 1 John W. Strong, *McCormick on Evidence* § 190 (4th ed. 1992). It frequently includes such spoken words as admissions of the defendant. Fed. R. Evid. 801(d)(2).

## CONCLUSION

The judgment of the Supreme Court of Wisconsin should be reversed.

Respectfully submitted,

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